

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID SAPPER,

Defendant.

Case No. 2:12-cr-00435-GMN-CWH

**FINDINGS AND
RECOMMENDATION**

This matter is before the Court on Defendant David Sapper's Motion to Dismiss for Outrageous Government Conduct (#13), filed on February 15, 2013. The Court also considered the Government's Response (#17), filed on March 11, 2013 and Defendant's Reply (#18), filed on March 18, 2013.

BACKGROUND

On February 24, 2012 at 12:33 p.m., a person later identified as Defendant David Sapper ("Sapper") posted a personal ad on Craigslist under the "casual encounters" section seeking a female for a sexual encounter. (#13, Ex. C). The ad identified the poster as "Thick, well endowed, white, handsome man looking for fun - m4w- 30." (*Id.*) The text of the post read: "I'm a sane, discreet man that would love to blow off some steam. I'm completely D&D free, have had a vasectomy, and am very clean. I'm tall, h/w/p and would love to show you a great time. Drop me a line with a picture or two, lets talk." (*Id.*) The post also included a sexually explicit photo of the male genitalia. (*Id.*)

Henderson Police Detective Wayne Nichols ("Detective Nichols"), through his training and experience, knew that Craigslist had been a forum where adults would post ads in the hopes of initiating communication with juveniles. (#13, Ex. A at 5). On February 24, 2012 at 4:48 p.m., Detective Nichols, posing as a 14 year-old girl ("Responder"), responded to the personal ad asking

1 whether the poster would be interested in someone younger. (#13, Ex. D). Sapper responded
2 “Always” and inquired as to the age of Responder, also asking for photos. (*Id.*) After 3 hours and
3 having not received a response, Sapper again emailed asking whether Responder had changed her
4 mind. (*Id.*) Responder replied saying she was fourteen years old. (*Id.*) Despite this, Sapper sent a
5 photo of himself and asked for a photo, to which Responder sent a photo of a girl. (*Id.*) The photo
6 was a forensically digitally regressed photo intending to depict a minor. In response to receiving
7 the photo, Sapper replied that he would be interested in having sex with Responder.¹ (*Id.*)

8 The conversation quickly turned sexual with Sapper asking Responder if she would be
9 interested in having sex without a condom, performing oral sex, and having anal sex. (*Id.*)
10 Multiple times Responder included her age in the response. Replying to the question about having
11 sex without a condom, Responder stated “im not tryin 2 b on mtvs 14 and pregggers,” putting Sapper
12 on notice a second time that he was communicating with a minor. Replying to the question about
13 anal sex, Responder stated “im 14 not some porn staR! (sic),” again putting Sapper on notice that
14 he was communicating with a minor. (*Id.*) Sapper also asked when they should meet and how
15 soon Responder could meet him. (*Id.*) Responder stated that she would have to “sneek out” (sic)
16 and “plot [her] escape” from the house because she lived with her aunt. (*Id.*) Responder said she
17 would suggest a time “after [she got] outta school.” (*Id.*) After coordinating a meeting time and
18 place, Sapper instructed Responder to “[d]ress in something easy to take off, like a sweat suit with
19 no underwear/bra” and to “hop in the car” and begin performing oral sex on him. (*Id.*) Sapper and
20 Responder agreed to rendezvous outside a Subway in a shopping center in Henderson, Nevada.
21 (*Id.*) Sapper told Responder he would be driving a black four-door sedan. (*Id.*)

22 Close to the time of the scheduled meeting time, Detectives set-up surveillance near the
23 Subway and “observed a black Hyundai Genesis with Nevada dealership plates pull into the
24 parking lot” and circle the lot three times, each time slowing in front of the Subway with the driver
25 looking into the dining establishment. (#13, Ex. F). Detectives conducted a traffic stop based on

26
27 ¹ 18 U.S.C. § 2422(b) imposes criminal liability when the defendant believes he is inducing a
28 minor, even though the object of his inducement is actually an adult. *See United States v. Meek*, 366
F.3d 705, 717 (9th Cir. 2004).

1 reasonable suspicion. (*Id.*) Detectives recognized the driver as the same person from the photo
2 sent earlier to the Responder. (*Id.*) The driver was identified as Sapper. (*Id.*) Sapper was arrested
3 for using technology to lure a minor and was transported to the Henderson Police Department. At
4 the station he was read his *Miranda* rights and exercising those rights, refused to answer questions.
5 Sapper did confirm his current address, which was listed on his driver's license.

6 Detective Nichols obtained a search warrant for the residence. (*Id.*) Detectives also
7 discovered Sapper was a twice convicted felon with convictions in 1997 and 1998. (#13, Ex. H).
8 During the service of the search warrant at the residence on Tina Chan, Sapper's fiancé, detectives
9 noticed several firearms at the residence. One was in a partially opened gun bag that had Sapper's
10 business card affixed to the outside. (*Id.*) Chan told officers that, when she began dating Sapper in
11 2010, Sapper already owned several guns and that she purchased additional firearms for Sapper
12 using his money. (*Id.*) She also explained that many of the guns were located throughout the house
13 because the couple had just gone shooting together. (*Id.*) The detectives obtained a piggy-back
14 search warrant referencing the prohibited person in possession of a firearm and collected eight
15 firearms from the residence. (*Id.*) Detectives also made contact with Sapper's employer,
16 Henderson Hyundai. (*Id.*) Frank Maione, the point of contact, confirmed Sapper had an office and
17 voluntarily turned over Sapper's personal computer kept at the business. (*Id.*) Detectives obtained
18 another warrant to forensically examine all electronics recovered from the residence and place of
19 business. (*Id.*)

20 On November 14, 2012, Defendant David Sapper ("Sapper") was indicted for one count of
21 Coercion and Enticement, in violation of 18 U.S.C. §2422(b), and one count of Possession of a
22 Firearm by a Convicted Felon, in violation of 18 U.S.C. §922(g)(1) and §924(a)(2).

23 DISCUSSION

24 Sapper seeks to dismiss the indictment based on "outrageous government conduct" pursuant
25 to the Due Process Clause of the Fifth Amendment to the United States Constitution. *See United*
26 *States v. Russell*, 411 U.S. 423 (1973). Such assertion requires the Court to determine if Sapper's
27 constitutional rights will be violated if prosecution is allowed to proceed. Consequentially, it is a
28 question of law to be decided by the Court, not an issue for the jury. *See United States v. Sotelo-*

1 *Murillo*, 887 F.2d 176, 182 (9th Cir. 1989) (citing *United States v. Montilla*, 870 F.2d 549, 551 n.1
 2 (9th Cir. 1989); see also *United States v. Prairie*, 572 F.2d 1316, 1319 (9th Cir. 1978)). The Court
 3 views “the evidence in the light most favorable to the government.” *United States v. Gurolla*, 333
 4 F.3d 944, 950 (9th Cir. 2003), *cert. denied*, 540 U.S. 995 (2003).

5 **I. Outrageous Government Conduct Standard**

6 The notion that government misconduct could warrant dismissal of an indictment originates
 7 in the dicta of *United States v. Russell*, 411, U.S. 423, 431-32 (1973). In *Russell*, the Supreme
 8 Court noted that there may be a “situation in which the conduct of law enforcement agents is so
 9 outrageous that due process principles would absolutely bar the government from invoking judicial
 10 processes to obtain a conviction.” *Id.* Subsequently, the Supreme Court posited that it has the
 11 power to bar conviction of a defendant on due process grounds if government conduct reaches a
 12 “demonstrable level of outrageousness.” *Hampton v. United States*, 425 U.S. 484, 491-95 (1976).

13 “Outrageous government conduct refers to behavior of investigators.” *United States v.*
 14 *Garza-Juarez*, 992 F.2d 896, 903 (9th Cir. 1993). “The government’s conduct may warrant a
 15 dismissal of the indictment if that conduct is so excessive, flagrant, scandalous, intolerable and
 16 offensive as to violate due process; the trial court may also dismiss the indictment in the exercise of
 17 general supervisory powers.” *Id.* at 904. However, the successful assertion of this notion is
 18 extremely rare. See *United States v. Ryan*, 548 F.3d 782, 789 (9th Cir. 1976) (explaining that “the
 19 due process channel which *Russell* kept open is a most narrow one”). To be sure, the only
 20 successful assertion of outrageous government conduct in the Ninth Circuit was in *Greene v.*
 21 *United States*, 454 F.2d 783 (9th Cir. 1971), which predates *Russell* and *Hampton*. In *Greene*,
 22 outrageous government conduct was found when the government agent contacted the defendant,
 23 urged him to run an illegal still, provided materials for the still, employed veiled threats to convince
 24 him to keep the still running, and was the sole customer. *Id.*

25 As a result, to “secure the dismissal of an indictment on due process grounds, ‘a defendant
 26 must meet an extremely high standard.’” *United States v. Nobari*, 574 F.3d 1065, 1081 (9th Cir.
 27 2009) (quoting *United States v. Smith*, 924 F.2d 889, 897 (9th Cir. 1991)). The Defendant “will not
 28 succeed unless the governmental conduct challenged is so grossly shocking and so outrageous as to

1 violate the universal sense of justice.” *Smith*, 924 F.2d at 897. In addition, “the government’s
 2 involvement must be *malum in se* or amount to the engineering and direction of the criminal
 3 enterprise from start to finish.” *Id.* However, the standard “is not met when the government
 4 merely infiltrates an existing organization, approaches persons it believes to be already engaged in
 5 or planning to participate in the conspiracy, or provides valuable and necessary items to the
 6 venture.” *United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir. 2003).

7 The Ninth Circuit has elucidated five factors to consider when determining whether
 8 government conduct was permissible including: “(1) the defendant was already involved in a
 9 continuing series of similar crimes, or the charged criminal enterprise was already in progress at the
 10 time the government agent became involved; (2) the agent’s participation was not necessary to
 11 enable the defendants to continue the criminal activity; (3) the agent used artifice and stratagem to
 12 ferret out criminal activity; (4) the agent infiltrated a criminal organization; and (5) the agent
 13 approached persons already contemplating or engaged in criminal activity.” *United States v.*
 14 *Bonanno*, 852 F.2d 434, 437-38 (9th Cir. 1988). While *Bonanno* provides five examples of
 15 situations in which the government conduct is permissible, it is not a “reverse-checklist,” such that
 16 “if none of these five situations occurred, then, as a matter of law, the government conduct has been
 17 outrageous.” *United States v. Velasquez-Lopez*, 2010 WL 1996605 *2 (D. Ariz. May 29, 2010),
 18 *aff’d* No. 11-10130, 2013 WL 646843 (9th Cir. Feb. 13, 2013).

19 **II. Outrageous Government Conduct Application**

20 Sapper alleges that this case falls into the narrow category of cases that warrants dismissal
 21 for outrageous government conduct. Specifically, Sapper argues that “the Henderson police
 22 department’s acts rose to the level of outrageous government conduct” because “Detective Nichols
 23 initiated contact” with Sapper based on a personal ad that “had no outward indication that the
 24 poster was seeking to contact a minor.” (#13 at 4). Additionally, Sapper argues that because
 25 “Craigslist’s very terms of use prohibit minors from using the website,” it “shocks the conscience”
 26 that a police officer would “submit a reply to a personals ad” posing as minor without any reason or
 27 suspicion. (*Id.*) Further, Sapper argues that there is a legitimate question as to whether the picture
 28 Detective Nichols submitted is sufficiently “forensically regressed” to “portray a minor.” (*Id.*)

1 Finally, Sapper argues that the government conduct failed to meet any *Bonanno* factor, and thus,
 2 the government conduct was outrageous.²

3 **A. Bonanno Factors**

4 Sapper requests that the Court apply the *Bonanno* factors as a reverse-checklist. He argues
 5 that the Court should find the government conduct outrageous because none of the five factors are
 6 met. The Government counters that not only were all five factors met, but also, Detective Nichols’
 7 actions did not “amount to the engineering and direction of the criminal enterprise from start to
 8 finish.” The Government argues that Detective Nichols merely “injected himself as an undercover
 9 agent into [Sapper’s] ongoing attempt to lure a young girl for sexual contact.”

10 The Court is not convinced that Sapper’s reading of *Bonanno* is proper. The Court finds
 11 that the *Bonanno* factors only help guide its totality of the circumstances analysis. The
 12 Government need not meet every single factor before its conduct can be deemed acceptable. In
 13 fact, *Bonanno* cannot be a conjunctive elements list that the government must meet to defend
 14 against an outrageous government conduct claim for two main reasons. First, the factors overlap.
 15 Factor one, “the charged criminal enterprise was already in progress at the time the government
 16 agent became involved,” and factor five, “agent approached persons already . . . engaged in
 17 criminal activity,” overlap. As a result, the inclusion of both as “elements” rather than factors,
 18 would render one of the two superfluous. Second, the Court agrees with the *Velasquez-Lopez*
 19 Court’s adoption of the reasoning in *United States v. Simpson*, 2010 WL 1611483, explaining:

20 [The] analysis regarding outrageous government conduct is a totality of the circumstances
 21 test, and the nonexistence of one of the five factors, while informative, does not dictate
 22 that the government’s conduct was outrageous. *See United States v. Gurolla*, 333 F.3d
 23 944, 950–51 (9th Cir. 2003) (finding no outrageous government conduct while addressing
 only the first of the five factors). The test in *Williams* does not say if, *and only if*, the five
Bonanno factors are met, the government conduct is acceptable. Rather, it appears the
 factors are guidelines that provide a means to analyze the government’s behavior. To

24
 25 ² Sapper also argues that, because of the outrageous conduct in the primary charge of coercion
 26 and enticement, any evidence pertaining to the charge of felon in possession of a firearm should be
 27 excluded as fruit of the poisonous tree. To that end, Sapper contends that the ancillary felon in
 28 possession charge should also be dismissed. However, as Sapper has not challenged the validity of the
 search warrant, the Court will not address or reach any conclusions relating to the search or ancillary
 felon in possession charges in this order.

1 conclude that the government's conduct was unacceptable, or "outrageous" if one of the
2 factors is not met would require a strict application of the factors in every instance of
3 questioned government conduct. However, outrageous government conduct is to be
4 analyzed by considering the totality of the circumstances in each case.

5 In considering the *Bonanno* factors, the Court finds that the factors heavily weigh in favor
6 of finding the government's actions to be permissible. Here, the government conduct was
7 Detective Nichols approaching Sapper who Detective Nichols believed to be already engaged in or
8 planning to participate in the crime. *Gurolla*, 333 F.3d at 950. First, Sapper had posted a "casual
9 encounters" personal ad on Craigslist. Detective Nichols knew that Craigslist is a forum where
10 adults are known to post ads to initiate contact with minors. Detective Nichols did not encourage
11 Sapper to post the ad. Rather, Detective Nichols approached, investigated, and enticed Sapper who
12 had already posted the ad and who plausibly had been engaging in or contemplating criminal
13 activity.

14 Second, Detective Nichols did nothing to enable Sapper to continue the enticement of the
15 minor because even after learning that the Responder was 14 years-old, Sapper took steps to further
16 the sexually explicit conversation. Moreover, despite several references to her age, her school, and
17 having to sneak out of her aunt's house to meet him, Sapper continued to escalate the sexual nature
18 of the conversation. Sapper could have ended the conversation and association at any time. But
19 rather, all questions relating to the nature of the rendezvous were posited by Sapper, not Responder

20 Third, Detective Nichols used artifice and stratagem, posing as a 14 year-old girl, to
21 discover the criminal activity. Sapper plausibly had been contemplating or had engaged in criminal
22 activity at the time he was approached. Thus, most of the *Bonanno* factors are met and the
23 government conduct was not outrageous.

24 **B. Totality of the Circumstances**

25 The Court finds that, based on the totality of the circumstances, the Detectives' actions do
26 not "shock the conscience." The Court is not persuaded that an undercover agent would "submit a
27 reply to a personals ad" posing as minor without any reason or suspicion. The Ninth Circuit has
28 explicitly rejected the notion that reasonable suspicion is required before agents can begin an
undercover operation. *United States v. Garza-Juarez*, 992 F.2d 896, 904 (9th Cir. 1993) ("In

1 partially vacating the three-judge court's opinion, we follow four of our sister circuits in explicitly
 2 rejecting a 'reasoned grounds' requirement for investigation of an individual under the due process
 3 clause . . . Therefore, any inability to state reasons for investigating Joe Juarez does not represent a
 4 constitutional violation.") Accordingly, any objections to the reason the investigation began are
 5 unpersuasive. Moreover, in a similar case, the Ninth Circuit found that sending questionnaires to
 6 persons whom the government believed might be interested in child pornography and contacting
 7 and investigating those who replied to the questions in a certain manner was not outrageous
 8 government conduct. *United States v. Mitchell*, 915 F.2d 521, 525 (9th Cir. 1990).³ Here,
 9 Detective Nichols used his knowledge that Craigslist had been a forum where adults would post ads
 10 in the hopes of initiating communication with juveniles. Similar to *Mitchell*, where the government
 11 sent questionnaires and investigated those who replied, Detective Nichols sent response emails
 12 indicating he was younger and began investigating Sapper who replied that he was still interested,

14 ³ Additionally, there is a plethora of Ninth Circuit and other case law that documents the refusal
 15 to apply the outrageous government conduct theory to similar and even more questionable situations. As
 16 summarized in an unpublished Ninth Circuit decision, *United States v. Wegman*, 917 F.3d 1307, 1990
 17 WL 170409 at *4 n. 1 (9th Cir. Nov. 6, 1990), the following cases are examples of conduct deemed
 18 acceptable: *United States v. Luttrell*, 889 F.2d 806, 811–14 (9th Cir. 1989) (counterfeit credit card sting
 19 operation not outrageous government conduct); *United States v. Slaughter*, 891 F.2d 691, 695–96 (9th
 20 Cir. 1989) (government use of informant to strike up personal relationship with defendant and persuade
 21 him to sell cocaine not outrageous conduct); *United States v. Bonnano*, 852 F.2d 434, 437–38 (9th Cir.
 22 1988) (FBI informant posing as potential investor in fraudulent scheme did not constitute outrageous
 23 government conduct); *United States v. Citro*, 842 F.2d 1149, 1152–53 (9th Cir. 1988) (counterfeit credit
 24 card sting operation not outrageous government conduct); *United States v. Simpson*, 813 F.2d 1462,
 25 1464–71 (9th Cir. 1987) (FBI manipulating woman into providing sexual favors to lure target into
 26 selling heroin not outrageous conduct); *United States v. Emmert*, 829 F.2d 805 (9th Cir. 1987) (FBI
 27 approaching college student and offering \$200,000 finder's fee for securing cocaine supply for
 28 government agent not outrageous conduct); *Shaw v. Winters*, 796 F.2d 1124, 1125–26 (9th Cir. 1986)
 (food stamp sting operation not outrageous government conduct); *United States v. Wiley*, 794 F.2d 514,
 515–16 (9th Cir. 1986) (government activation of scheme to smuggle drugs into prison not outrageous
 conduct); *United States v. Williams*, 791 F.2d 1383, 1386–87 (9th Cir. 1986) (prison authorities' prior
 knowledge of escape plans not outrageous conduct); *United States v. Driscoll*, 853 F.2d 84, 85–87 (3d
 Cir. 1988) (child pornography sting operation not outrageous government conduct); *United States v.*
Musslyn, 865 F.2d 945, 946–47 (8th Cir. 1989) (child pornography sting operation not outrageous
 government conduct). As these cases illustrate, several instances of "questionable" government behavior
 have been found to fall short of "outrageous" government conduct.

1 even after learning the Responder was 14 years-old. Also, Sapper's objection based on the fact that
2 Craigslist's terms of use prohibits minors from using the website ignores the fact that Sapper was
3 put on notice multiple times that he was communicating with a 14 year-old. Further, Sapper argues
4 that there is a legitimate question as to whether the picture Detective Nichols submitted is
5 sufficiently "forensically regressed" to "portray a minor. Viewing the facts in the light most
6 favorable to the Government, it can be reasonably said that the picture portrays a 14 year-old girl.
7 Moreover, as the picture was preceded with Responder's statement that she was 14 years-old, it
8 was reasonable to believe that the picture intended to portray a 14 year-old girl.

9 Ultimately, the Court finds that Sapper has not presented sufficient evidence to prove that
10 the Government utilized physical or psychological coercion to engineer and direct the criminal
11 enterprise from start to finish in this case. *See Bonanno*, 852 F.2d 434. Consequently, Sapper has
12 not carried his burden of proving that the Government's conduct was so outrageous as to violate the
13 "universal sense of justice." *Smith*, 924 F.2d at 897. Accordingly, the Court will recommend that
14 Sapper's Motion to Dismiss be denied.

15 Based on the foregoing and good cause appearing therefore,

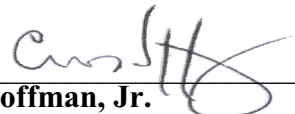
16 **RECOMMENDATION**

17 **IT IS HEREBY RECOMMENDED** that Defendant David Sapper's Motion to Dismiss for
18 Outrageous Government Conduct (#13) be **denied**.

19 **NOTICE**

20 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in
21 writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has held
22 that the courts of appeal may determine that an appeal has been waived due to the failure to file
23 objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also
24 held that (1) failure to file objections within the specified time and (2) failure to properly address and
25 brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual
26 issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt*
27 *v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).
28

DATED this 15th day of April, 2013.


C.W. Hoffman, Jr.
United States Magistrate Judge